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OPEN ADOPTION, INHERITANCE, AND THE “UNCLEING” PRINCIPLE

E. Gary Spitko*

I. INTRODUCTION

This article critiques current inheritance law relating to adopted children in light of the purposes of modern adoption law and the increasing prevalence of open adoptions.¹ In general, the current law governing inheritance rights arising from adoption derives from a substitution principle, which seeks to treat an adopted child for all purposes, including with respect to inheritance rights, as having been born into her adoptive family.² This substitution principle, however, does not fit comfortably within an open adoption paradigm in which a birth parent has entered into an open adoption agreement with the adoptive parents and has maintained a relationship with the child subsequent to the adoption.

Indeed, this substitution principle might disserve all members of the adoption triad—the adopted child, the

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1. For a comprehensive report on the present state of infant adoption in the United States, an examination of “the body of research on the long-term social-psychological consequences of adoption for birthparents,” and a set of recommendations for reform of adoption law and practices, see SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., *SAFEGUARDING THE RIGHTS AND WELL BEING OF BIRTH PARENTS IN THE ADOPTION PROCESS* (2007), available [at](http://www.adoptioninstitute.org/publications/2006_11_Birthparent_Study_All.pdf) http://www.adoptioninstitute.org/publications/2006_11_Birthparent_Study_All.pdf. This report concludes that “[c]urrent adoption-related statutes are too often based on outdated understandings, faulty stereotypes, and misinformation from the time that secrecy pervaded the adoption world.” *Id.* at 12.

2. See *infra* notes 26-30 and accompanying text.

adoptive parents, and the birth parents—involved in an open adoption by failing to recognize and respect the differences between the family formed by open adoption and the family based on blood.³ Families by adoption generally face challenges with respect to identity and separation that families by blood do not.⁴ Most notably, an adopted child might suffer feelings of loss and abandonment relating to the adoption⁵ and might feel a psychological need to know and connect with her birth family.⁶ Also, an adoptive parent might feel insecure in her identity as the adoptive child's parent in light of the birth parent's competing claim to that identity.⁷ Such insecurities may exist even if the birth parent

3. As Professor Naomi Cahn has commented:

Even as adoption law has moved toward erasing differences between adopted children and blood children, this belies the reality that adoptive families do face different challenges. Moreover, the attempt to erase differences may, paradoxically, contribute to the stigma of adoption: there is something less satisfactory, or even shameful, about adoption, such that adoptive families must conform to the norm established by blood families. Adoptive families confront very different issues from biologically based families, and erasing those different issues by assuming complete comparability prevents all members of the adoption triad from creatively confronting these differences.

Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1165 (2003).

4. See, e.g., Annette Baran and Reuben Pannor, *Perspectives on Open Adoption*, in 3 ADOPTION 119 (1993) (reviewing the negative effects of anonymity in adoption on the birth parents, the adoptee, and the adoptive parents).

5. See *id.* at 122 (“[I]t is our belief, based on years of work with adoptees of all ages, that some of them are particularly vulnerable because of feelings of loss and abandonment, exacerbated by the secrecy and anonymity of closed adoptions.”).

6. See *id.* at 120 (describing how an adoptee's lack of knowledge of her personal history may lead to “fantasies and distortions” and how certain major events in the adoptee's life, such as her marriage or the birth of a child, may “create an urgent desire for specific background information, particularly about family history”).

7. See generally JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATION OF KINSHIP IN AMERICAN CULTURE 226 (1994) (“A paper parenthood cannot compare with the ‘physical realities’ of conception, creation, gestation, and birth, not in American culture anyway.”); Baran & Pannor, *supra* note 4. Of relevance also is the proposition that:

[A]doption and assisted reproduction are not equally valued, given the nearly overwhelming desire for and bias in favor of genetically-related children. Thus, the possibility of a genetic tie to a child born through assisted reproduction may make that choice appear more understandable and legitimate in a society that extols consanguineous relationships and regards nonconsanguineous relationships with suspicion, if not derision.

has not maintained a relationship with the adopted child and even if the adoptive family does not know the birth parent's identity.⁸ Finally, a birth parent might suffer chronic feelings of loss, regret, or shame relating to her decision to place her child for adoption.⁹ By ignoring these complex human emotions, inheritance law risks compounding the challenges arising from adoption that all members of the adoption triad face. Thus, inheritance law would better serve the interests of family members involved in an open adoption by recognizing the ways that adoptive families differ from blood families and also by recognizing the important differences between families arising from an open adoption as contrasted with families arising from a closed adoption.

This article, therefore, proposes a reform of the law governing inheritance rights arising from an open adoption to better serve the interests of all members of the adoption triad. Specifically, the article proposes reforming intestacy statutes to allow an adopted child and her birth parent who have maintained a "qualifying functional relationship" following an open adoption to inherit from and through each other as would an aunt or uncle and a niece or nephew. Thus, the proposed reform would treat the birth parent and adopted-out child as potential heirs of each other, but would

Richard F. Storrow, *Marginalizing Adoption Through the Regulation of Assisted Reproduction*, 35 CAP. U. L. REV. 479, 483 (2006); *see also id.* at 490 (attributing the stigmatization of adoption under Islam in part to a "belief that the only way for a parent to feel full parental instincts and devotion to a child is through a genetic connection to that child").

8. *See* Baran & Pannor, *supra* note 4, at 120-21 ("The ghosts of the birthparents, inherent in the closed system, are ever present, and may lead to the fear that these parents will reclaim the child and that the child will love these parents more than the adoptive parents.").

9. *Id.* at 120 ("Relinquishment of a newborn child may be profoundly damaging to birthparents and cause lifelong pain and suffering. Even when relinquishment is a carefully considered and chosen option, birthmothers—and often birthfathers—may suffer from a heightened sense of worthlessness after giving away a child."). *See also* Smith, *supra* note 1, at 5 ("Research on birthparents in the era of confidential (closed) adoptions suggests a significant proportion struggled - and sometimes continue to struggle - with chronic, unresolved grief. The primary factor bringing peace of mind is knowledge about their children's well-being."). Smith is careful to note that "the research on long-term outcomes of birthmothers is rife with methodological problems" such as the use of clinical or self-selected samples and retrospective surveys, the limited utilization of comparison groups or standardized measures, the failure to examine outcomes by cohort or adoption practices experienced. *See id.* at 46.

also increase the distance between them on the family tree.

The proposed reform also would extend this “uncleing” principle¹⁰ to more distant biological relations of the adopted child by similarly moving the biological relations further away from the child on the family tree. Specifically, the uncleing principle would add one “line of inheritance” and two “degrees of kinship” to the line of inheritance and degree of kinship otherwise existing based on biology.¹¹ Thus, for example, when the qualifying functional relationship exists between biological parent and adopted child, the intestacy scheme would treat an adopted child’s birth aunt or uncle (a second-line, third-degree biological relation) as a first cousin once removed (a third-line, fifth-degree relation).

My proposed reform has as a grounding principle that inheritance law should not, under any circumstances, treat as a parent of a child one who has not actually parented that child.¹² Biology alone does not make one a parent and the law should not imply that it does.¹³ In all instances, therefore, my proposed reform would treat a biological parent who has not raised her child as less than a legal parent for purposes of inheritance. At the same time, my proposed reform seeks to acknowledge the psychological importance of the biological

10. I use the term “uncleing” principle rather than “aunting” principle for the sake of euphony.

11. For a discussion of intestate taking by collateral relatives, including the parentelic (line of inheritance) and degree-of-kinship systems, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmts. a-1 (1998); see also JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 78-80 (7th ed. 2005). I explain the calculation of a “line of inheritance” and a “degree of kinship” *infra*, notes 81-85 and accompanying text, in the context of discussing more fully inheritance through a birth parent or adopted-out child under the uncleing principle.

12. Cf. UNIF. PROBATE CODE § 2-114(c) (amended 1993) (allowing inheritance from or through a child by either natural parent or his or her kindred only if the natural parent has openly treated the child as his or hers and has not refused to support the child); CAL. PROB. CODE § 6452 (West Supp. 2008) (allowing a natural parent or relative of that natural parent to inherit from or through a child born out of wedlock on the basis of the parent and child relationship alone only if the natural parent or relative of the natural parent “acknowledged the child” and the natural parent or relative of the natural parent “contributed to the support or the care of the child”).

13. See E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother’s Consent to the Biological Father’s Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 100 (2006) (arguing that constitutional protection for parental rights arises in part from the “performance of parental labor that is sustained and has a positive and profound impact on the development of the child”).

connection for both adopted children and their birth families. Thus, my proposed reform would treat an adopted child and her biological family as potential heirs of one another when the biological connection has been augmented by a qualifying functional relationship subsequent to the open adoption.

I would expect that my proposed reform, at a surface level, would impact relatively few people. Consider that, for example, under the proposed reform, an adopted child would be an heir of her biological parent only if that biological parent entered into an open adoption agreement with respect to the child, maintained a qualifying functional relationship with the child, died intestate, and was not survived by any spouse, legally-recognized living descendant, parent, or sibling. But I think that the value of the proposed reform should not be measured only in terms of the relative number of people who would actually take under it or the relative amount of wealth that would actually be affected by it.

Indeed, the proposed reform would better serve the interests and needs of adopted children, their adoptive families, and their birth families even in cases in which no one involved in a particular adoption ever inherits under the proposed reform. The value added relates to the notion that inheritance law in general, and the intestacy statute in particular, is rivaled only by blood and marriage as a means by which we as a society define who is "family."¹⁴ Thus, when a testator writes a will, she is able to define for herself with precision who she views as her family. Indeed, disinheritance wounds the disinherited heir not only because of the consequent financial loss, but also because of the disinherited heir's realization that the testator has removed her from her family.¹⁵

14. See Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643 (2002). Gary asserts that the "definitions of 'family' imbedded in intestacy statutes send a message about who counts as a family member and whose families count." *Id.* at 645. Gary further explains that intestacy statutes give "emotional support to family members simply by identifying them as persons entitled to a distribution from the decedent's estate." *Id.* at 652. For a contrary proposition, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1054 (2004) (opining that "the expressive ramifications of intestacy law appear alternately negligible and irrelevant, and the conclusion follows that they should not influence the formulation of rules of intestacy or other inheritance defaults in (virtually) any respect").

15. See Susan N. Gary, *Mediation and the Elderly: Using Mediation to*

The proposed reform would serve the interests of adoptive families by not defining genetic parents as the adopted child's actual parents. In that way, the proposed reform avoids devaluing the actual parental labor that adoptive parents perform.¹⁶ The proposed reform would serve the interests of birth families and adopted children by defining them as potential heirs with respect to each other, and thereby recognizing the psychological importance of the biological connection between them when the biological connection is accompanied by a meaningful social relationship.

II. INHERITANCE AND MODELS OF ADOPTION

Early American adoption statutes varied with respect to their treatment of the inheritance rights of adopted children and their birth and adoptive families.¹⁷ While some of these statutes expressly treated adopted children as similar to biological or "natural" children for the purposes of inheritance,¹⁸ other statutes expressly treated adopted children quite differently from biological children with respect to inheritance.¹⁹ Professor Naomi Cahn summarizes the

Resolve Probate Disputes over Guardianship and Inheritance, 32 WAKE FOREST L. REV. 397, 415-23 (1997) (discussing the emotional significance that family members and will contestants attach to inheritance).

16. Cf. Cahn, *supra* note 3, at 1081 (noting the challenge of determining "how to expand the meaning of family without destabilizing families").

17. See generally *id.* at 1126-39 (summarizing the evolution of American adoption law with respect to inheritance rights); see also *Keegan v. Geraghty*, 101 Ill. 26, 33 (1881) (noting that a majority of states had enacted adoption statutes, that "[t]here is not uniformity in such statutes," and "[i]n no two of them, perhaps, are the new rights and obligations precisely the same"). For a brief history of the evolving purposes and structure of American adoption law, see Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1956); see also Jan Ellen Rein, *Relatives by Blood, Adoption and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 714-17 (1984).

18. But cf. Cahn, *supra* note 3, at 1132 ("[N]o [early American adoption] statute accorded adoptive children the same intestacy rights as biological children.").

19. See *id.* at 1128; see also Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry Into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 395-96 (2001) (surveying legal periodicals from the 1920s through the 1960s and concluding that "[b]efore 1935, adopted children were permitted to inherit from their adoptive parents, although they were generally unable to inherit from relatives of the adoptive parents. Adopted children were usually permitted to inherit from their birth parents as well as from other birth relatives.").

distinctions made by early adoption statutes as follows:

First, some statutes explicitly specified differences between the rights of adopted children and biological children to inherit from their [adoptive] parents. Second, historically, under the 'stranger-to-the-adoption' rule, an adopted child generally could not inherit from relatives who were not a party to the adoption. Third, adoptive children could continue to inherit from their biological relatives in some states, and their biological relatives could inherit from them even after the adoption. Finally, even outside the general laws of intestacy and wills, the adoption statutes allowed the adoption agreement to determine the adoptee's rights.²⁰

Professor Cahn also notes that the cases interpreting these early adoption statutes were inconsistent. "In some cases, judges interpreted the adoption statutes broadly, and in others, narrowly, using the same general legal principles and applying them to similar facts."²¹ The maxim that "God alone makes the heir, not man" informed the narrow approach.²² The norm, which still has some currency today, was that inheritance rights "naturally" derive from blood ties; therefore, only a clear statutory mandate or a valid testamentary instrument could impair such inheritance rights.²³ Related to this norm is the belief that a decedent

20. Cahn, *supra* note 3, at 1128; *see also id.* at 1128-32 (discussing particular statutory provisions from various states illustrating these generalizations); *id.* at 1127 (noting that some early adoption statutes that allowed the adopted child to inherit as an heir of the adoptive parents nevertheless did not allow the adoptive parents to inherit from the adopted child).

21. *Id.* at 1126.

22. *See Rein, supra* note 17, at 713.

23. *See id.* at 713, 722; *see also* Cahn, *supra* note 3, at 1127 ("In applying the adoption statutes in the context of the common-law doctrine of blood-based inheritance, courts were chary of granting non-blood related children significant intestacy interests, and thus scrutinized carefully the claims of adoptive children, lest they usurp 'legitimate' children."); *Upson v. Noble*, 35 Ohio St. 655, 658 (1880) ("This [adoption] statute, in so far as it changes the general course of descents and distribution of intestate property, and ignores all merit on account of blood, should be strictly construed."); *Keegan v. Geraghty*, 101 Ill. 26, 39 (1881) ("As against the adopted child the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial."); *Ex parte Clark*, 25 P. 967, 968 (Cal. 1891) (commenting that rights arising from adoption are "purely statutory," that transfer of "natural rights" from the birth parents is "repugnant to the principles of the common law" and that "all doubts in controversies

“naturally” would want her property to pass to her blood relations to the exclusion of non-blood relations.²⁴ As the Illinois Supreme Court reasoned in 1881 in adjudicating a probate dispute,

[t]o have [the property of a decedent who was not the adoptive parent but was the natural child of the adoptive parent] turned away upon his death from blood relations, where it would be the natural desire to have property go, and pass into the hands of an alien in blood[, her adoptive half-sister],—to produce such effect, it seems to us, the language of the statute should be most clear and unmistakable²⁵

In contrast, modern adoption and inheritance statutes generally treat the adopted child as a full-fledged member of the adoptive family and a stranger to the biological family for purposes of inheritance.²⁶ This approach purports to further

between the natural and the adopting parents should be resolved in favor of the former”); *Sarazin v. Union R.R. Co.*, 55 S.W. 92, 94 (Mo. 1900) (“Adoption is in derogation of the common law, and purely of statutory enactment, and, like all other similar statutes, must be strictly complied with.”).

24. See Cahn, *supra* note 3, at 1128 (“The assumption underlying the disinheritance of adopted children was, obviously, that decedents wanted their estates to go to blood relatives.”); see also *Helms v. Elliott*, 14 S.W. 930, 931 (Tenn. 1890) (holding that “[a]s to the estates of other persons than the adopting parent, the law of adoption fixes no rights in the adopted child” and distinguishing case law holding that statute of legitimation conferred greater inheritance rights on legitimated children on the ground that “the bastard has the blood of his parents”).

25. *Keegan*, 101 Ill. at 39.

26. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5(2) (1998) (“An adopted individual is a child of his or her adoptive parent or parents [and . . .] if the adoption removes the child from the families of both of the genetic parents, the child is not a child of either genetic parent.”); *id.* at cmt. d (“An adopted child is treated as a child of his or her adoptive parent or parents. Most intestacy statutes . . . treat an adopted child as a full-fledged member of the child’s adoptive family.”); CAL. PROB. CODE § 6450(b) (West Supp. 2008) (“The relationship of parent and child exists between an adopted person and the person’s adopting parent or parents.”); CAL. PROB. CODE § 6451(a) (“A[n] adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person”);

The express provisions of [the Georgia statute providing for the effect of an adoption decree] make plain that the legislature intended that following adoption there be a complete substitution of families for the adopted individual. Consequently, in the case of adoption by unrelated persons, there is a termination of the adopted individual’s legal ties with his natural parents, not only for the purposes of intestate succession but also with regard to the passing of property by virtue of written instruments, including wills and trusts.

Miller v. Walker, 514 S.E.2d 22, 25 (Ga. 1999); *Estate of Best*, 485 N.E.2d 1010,

donative intent in the run of cases. For example, the decision to derive an intestacy statute from such a "substitution" principle likely reflects in part the belief that in a typical adoption, the adoptive family members are likely to come to accept each other as their next of kin while, in contrast, the birth family and the adoptive child are not likely to view each other as next of kin.²⁷

More generally, an important rationale grounding this "substitution" approach is that adoption should give the adopted child a "fresh start" with a substitute family and, accordingly, the law should treat the child as though he had been born into the adoptive family.²⁸ Moreover, severing all ties with the biological family, the thinking goes, furthers the adopted child's assimilation into his substitute family.²⁹

1012 (N.Y. 1985) (construing class gift to exclude child adopted out of donor's family and reasoning that "[i]n detailing adoption procedures (citation omitted) the Legislature clearly intended that the adopted child be severed from the biological family tree and be engrafted upon new parentage."); *see generally* 3 ADOPTION LAW & PRACTICE §§ 12-B.01-.02 (Joan Heifetz Hollinger ed., 2007) (discussing the construction of class gifts in testamentary instruments in relation to the inclusion or exclusion of adopted persons). There are exceptions. *See, e.g.*;

An adopted individual is the child of his [or her] adopting parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

UNIF. PROBATE CODE § 2-114(b) (1990); *see also* CAL. PROB. CODE § 6451 (West Supp. 2008) (providing for exceptions relating to adoption by a stepparent or after the death of a natural parent); LA. CHILD. CODE ANN. art. 1218(B) (2004) ("The right of the child to inherit from his parents and other blood relatives is unaffected by the adoption."); TEX. PROB. CODE ANN. § 40 (Vernon 2006 & Supp. 2007-2008) (with certain exceptions, the adopted "child shall inherit from and through its natural parent or parents").

27. My proposed reform of intestacy statutes implementing the uncleing principle in certain cases of open adoption also is grounded in part on the presumed donative intent of the adopted-out child and members of the birth family. *Infra* notes 94-95 and accompanying text. I have been unable, however, to locate any empirical study that speaks directly to the question of the donative intent of birth parents or adopted-out children in such cases of open adoption.

28. *See Rein, supra* note 17, at 713, 717, 721; *see also* Harvey Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228, 285 (1955).

29. *See Rein, supra* note 17, at 717 (arguing that "it is apparent that an adoptee's retention of ties with his biological family can undermine the psychological aspect of this assimilation" into the adoptive family); *see also id.* at 729 ("The child's bonding with his adoptive family is disturbed if the child's biological relatives interfere with the new family."); Patricia G. Roberts, *Adopted and Nonmarital Children - Exploring the 1990 Uniform Probate Code's*

Thus, the modern approach to inheritance rights arising from adoption is consistent with, and indeed derives from, what Professor Joan Hollinger describes as the “asserted-equivalence model” of adoption that grounds a closed adoption paradigm:

[B]iogeneticism and the parental rights doctrine embody an ideal to which many adoptive families aspire. This aspiration is most evident in the traditional assertion that adoptive families are a ‘complete substitute’ for, and function ‘as if’ they are, biogenetically-based families and are entitled to the same cultural acceptance and legal protection. For much of the 20th century, the asserted-equivalence model of adoption attempted to reinscribe the biogenetic family by creating a legal framework within which the personal and emotional ties of the ‘natural’ family were to be replicated. The goal was – and for many adoptive parents still is – to look and feel as close as possible to what they can never really have. State laws that seal adoption records, substitute the names of adoptive parents for birth parents on ‘certificates of live birth,’ and permit, even if they do not require, anonymity and strict separation between birth and adoptive families are fully consistent with the asserted-equivalence model.³⁰

The asserted-equivalence model, however, has come under sustained attack for more than a quarter century.³¹

Intestacy and Class Gift Provisions, 32 REAL PROP. PROB. & TR. J. 539, 543 (1998) (asserting that the rationale of the “fresh start” policy is that “it is in the child’s best interests to sever emotional and financial ties with the biological family to facilitate the creation of new ties with the adoptive family”); Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can it Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483, 490 (recognizing that proponents of the “exclusive model” argue that “banishment of the birth parents is necessary for the child to develop exclusive loyalties and obedience to the adoptive family so that the child’s value system and cognitive development can proceed unhindered by interference or threats from outside forces”).

30. Joan Heifetz Hollinger, *Authenticity and Identity in Contemporary Adoptive Families*, 3 J. GENDER SPECIFIC MED. 23, 24 (2000). Rein, *supra* note 17, adds further that “[t]he very purpose of state regulations requiring sealed adoption records is to protect the adoptive family from post adoption disruption, thereby strengthening the new family unit and promoting the adoptee’s assimilation into it.” *Id.* at 724. An additional purpose of state laws sealing adoption records was to protect the adoptive child and the birth parent from the supposed shame of a non-marital birth. See Janine Baer, *The Basic Bastard*, in FAMILIES BY LAW 146 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004); see also *In re Christine*, 397 A.2d 511, 513 (R.I. 1979) (confidentiality surrounding adoption “protects the adoptee from any possible stain of illegitimacy”).

31. Hollinger, *Authenticity and Identity*, *supra* note 30, at 23.

Critics argue that the approach "trivializ[es] the psychological, social, and indeed, biogenetic differences between 'natural' and adoptive families."³² Because of its emphasis on the equivalence of biogenetic families and adoptive families, critics argue, the model is ill-suited to address the challenges that all members of the adoption triad face arising from these profound psychological, social, and biogenetic differences.³³ Indeed, the asserted-equivalence model may exacerbate these challenges.

An alternative and ascendant model for adoption emphasizes openness and acceptance of the reality that adoptive families differ in meaningful ways from biogenetic families.³⁴ For ease of discussion, I shall refer to this way of thinking as the "differences approach." This differences approach provides a theoretical framework that supports the increasing acceptance and prevalence of open adoptions.

The term open adoption refers to arrangements that range from, at the one end, a limited exchange of information between birth parents and adoptive parents at the time of adoption to, at the other end, an enduring arrangement that facilitates exchanges of letters or visits among the birth parents and the child that they placed for adoption.³⁵ In recent years, the number of open adoptions as a total percentage of all infant adoptions has increased significantly.³⁶

32. *Id.*

33. *See id.* ("These differences are now said by many adoptees and birth parents, as well as by ever larger numbers of adoptive parents, to be of profound importance, and, if denied, continue to fester and threaten the well-being of all members of the adoption triad The denial of differences is no longer in vogue.").

34. *See id.* at 24, 24-25 ("'Openness' and the acknowledgment and acceptance of difference are rapidly becoming the mantras of contemporary adoption practice. Adoptive families continue to seek cultural acceptance and legal protection . . . doing so by applauding their distinctive characteristics and not portraying themselves as mirror images of the biogenetic families . . .").

35. *Id.*; *see also* Baran & Pannor, *supra* note 4, at 121 ("An open adoption is one in which the birthparent(s) at least meet the adoptive parents and may even participate in selecting them. . . . [O]pen adoption includes the exchange of identifying information and the making of agreements regarding future contact and communication.").

36. *See* Smith, *supra* note 1, at 19 (reviewing several studies and California Department of Social Services data and concluding that "it appears few totally closed adoptions take place in this country today, [and although] we do not know how many infant adoptions involve ongoing direct contact [between a birth parent and adopted-out child], [t]he preponderance of evidence indicates

This trend toward a greater prevalence of open adoptions in part reflects the increased bargaining power that today's birth parents (typically birth mothers) wield in the adoption transaction.³⁷ The increased availability and usage of birth control, the access to legal abortion, and the lessening of any stigma attached to out-of-wedlock birth have resulted in a greater shortage of healthy infants (particularly healthy white infants) available for adoption.³⁸ A birth mother today,

this is a minority of infant adoptions, but is steadily increasing"); *id.* at 6 (describing the trend since the 1970s "toward more openness in infant adoptions" and noting that presently approximately ninety percent of prospective birthmothers choose and meet the adoptive parents of their children); see also Susan M. Henney et al., *The Impact of Openness on Adoption Agency Practices: A Longitudinal Perspective*, 6 ADOPTION Q. 31, 38 (2003) (reporting the authors' longitudinal study finding that the percentage of adoption agencies offering fully-disclosed adoptions grew from thirty-six percent in 1987-1989 to seventy-nine percent in 1999 and concluding that during the period of the study "the range of openness options offered by these agencies has moved steadily toward greater openness"); Appell, *supra* note 29, at 489 (noting that "open adoption is becoming standard procedure" and suggesting reasons for this change); Sonia Nazario, *Between Two Families: A Pioneer in an Experiment Called Open Adoption; Kendall's Journey Illustrates the Struggle of Children Who Bond Both with Their Birth Families and Those Who Adopt Them*, L.A. TIMES, Aug. 5, 2007 (reporting that "[a]doption agencies estimate that 90% of infant adoptions in the United States are open enough for adoptive and birth parents to meet at least once -- and a quarter are completely open" and contrasting this present state with "[f]orty years ago [when] closed adoptions were the rule").

37. See Joan Heifetz Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in FAMILIES BY LAW 159, 159 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) ("Among the factors contributing to the prevalence of open adoptions is the rarely noted shift in power from adoptive to birth parents."); see also Henney et al., *supra* note 36, at 41 (reporting that during the time of their longitudinal study of adoption agency practices (1987-1999) "the most predominant factor leading to change [toward greater openness] was a response to birthmother demand"); Appell, *supra* note 29, at 489.

38. Smith, *supra* note 1, at 19 (reporting that "[p]rior to 1973, about one-fifth of unmarried white women relinquished their infants for adoption" but by 1995 the percentage had declined to 1.7%, and concluding that "[m]any social shifts help explain the decline of white children placed for adoption over the last few generations -- starting with the growing social acceptance of single, unmarried parenthood and also including the availability of contraception and family planning as well as the legalization of abortion"); *id.* at 16 (discussing national Survey of Family Growth data evidencing that "the number of voluntary placements for adoption has declined steadily since 1973" and providing specific data for never-married woman and never-married white women placing their infants for adoption in 1973 and 1995); see also Hollinger, *supra* note 37, at 159 (noting the "steep decline since the late 1960s in the number of healthy infants who are voluntarily relinquished for adoption"); Appell, *supra* note 29, at 486 (attributing the decline in the number of women relinquishing their newborn children for adoption primarily to "the

therefore, is able to have a voice in picking the adoptive parents for her child and, in some jurisdictions, is able to demand some degree of openness in exchange for her consent to the adoption.³⁹

There is a great deal of variation from jurisdiction to jurisdiction with respect to the enforceability of open adoption agreements that provide for post-adoption contact between the birth parents and the adopted child.⁴⁰ More than twenty states, however, have enacted statutes that allow courts to approve and enforce agreements between birth parents and adoptive parents with respect to post-adoption contact between the birth parents and the adopted child.⁴¹ Where a statute or case law provides for the enforcement of such agreements, a typical limitation is that the agreement and such visitation must be in the best interests of the child.⁴²

destigmatization of single motherhood and legalization of abortion").

39. See Hollinger, *supra* note 37, at 159 ("Birth parents, and especially birth mothers, are not only choosing the individuals who will parent their children, but often expect to retain a role in the life of the new adoptive family."); see also Appell, *supra* note 29, at 486 ("[B]ecause the demand for infants so exceeds the supply, birth parents are able to dictate some of the terms of relinquishment" including continuing exchange of pictures and letters and even visitation.).

40. See generally 3 ADOPTION LAW & PRACTICE, *supra* note 26, §§ 13-B.01-.02; see also Hollinger, *supra* note 37, at 160-61; Appell, *supra* note 29, at 501-07, 508-16 (discussing statutes in six states providing for the enforcement of open adoption agreements and critiquing the various statutory approaches). Compare *Groves v. Clark*, 920 P.2d 981, 984 (Mont. 1996) (interpreting Montana statute, MONT. CODE ANN. § 40-8-136, "to provide for the recognition of agreements for post-adoption contact and visitation"), with *Birth Mother v. Adoptive Parents*, 59 P.3d 1233, 1235 (Nev. 2002) (unless agreement for post-adoption contact is contained in the adoption decree, it cannot be enforced by the court).

41. Hollinger, *supra* note 37, at 161; see also EVAN B. DONALDSON ADOPTION INSTITUTE, STATE STATUTES: POST-ADOPTION CONTACT AGREEMENTS, *available at* <http://www.adoptioninstitute.org/policy/polopen5a.html> (providing information on the statutes of eleven states that have statutorily addressed post-adoption contact issues comprehensively and on the statutes of nine states that have statutorily addressed post-adoption contact issues in more limited ways).

42. See Hollinger, *supra* note 37, at 161 ("The 'best interests of the child' standard applies to judicial decisions to approve, modify, or enforce post-adoption contact or visitation agreements. . . . These statutes generally provide for a civil action to specifically enforce or modify contact or visitation agreements until an adoptee's 18th birthday, subject to a 'best interests' standard."); see also, e.g., *Groves*, 920 P.2d at 985 ("We conclude that birth parents and prospective parents are free to contract for post-adoption visitation and that trial courts must give effect to such contracts when continued visitation is in the best interests of the child."); CAL. FAM. CODE § 8616.5(b)(1) (West Supp. 2008) ("Nothing in the adoption laws of this state shall be

Supporters of openness in adoption argue that the open adoption process in general, and the enforcement of agreements for post-adoption contact between birth parent and adopted child in particular, promote the well-being of all members of the adoption triad.⁴³ In sum,

open adoption is said to enable birth mothers to diminish their sense of loss, adopted children to possess the piece of themselves missing from their otherwise secure adoptive family relationships, and adoptive parents to have access to information vital to their capacity to respond to their children's developmental, medical, and emotional needs.⁴⁴

For the birth parent, continuing contact with the adopted-out child allows the birth parent to demonstrate to the child that despite the decision to place the child for adoption, the birth parent continues to care about the child.⁴⁵ This may lessen the birth parent's feelings of guilt surrounding the decision to place the child for adoption.⁴⁶

construed to prevent [adoptive parents and birth relatives from entering into certain written post-adoption contact agreements] if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted.”).

43. See generally 3 ADOPTION LAW AND PRACTICE, *supra* note 26, § 13.02[3] (discussing how the interests of the birth parents, adoptive parents, and adopted child are said to be served by an open adoption); see also Baran & Pannor, *supra* note 4, at 119 (discussing findings that “requiring anonymity between birthparents and adoptive parents and sealing all information about the birthparents from the adopted child has damaging effects on all three parties” in the adoption triad). For a discussion of the benefits and risks of open adoption with contact, see Annette Ruth Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, 18 CHILDREN'S LEGAL RIGHTS J. 24 (1998). Professor Appell lists among the risks of adoption with contact that (1) difficulties in the relationship between the birth parent and the adoptive parents “could place the child in an untenable situation of conflicting loyalty”; (2) some may be disappointed and confused when a member of the adoption triad does not live up to the expectations of other members of the triad; (3) continuing contact might be threatening to a child who is insecure about the permanence of the adoption; (4) postadoption contact may blur boundaries between members of the adoption triad; and (5) a static agreement may not be responsive to the evolving needs of the child. *Id.* at 24.

44. Hollinger, *Authenticity and Identity*, *supra* note 30, at 25.

45. See Baran & Pannor, *supra* note 4, at 119; see also Smith, *supra* note 1, at 59-60 (“Birthmothers who have relationships with the children they relinquished for adoption often report that seeing them and being a resource for them and their families helps them to affirm the decisions they made and therefore to feel good about themselves.”).

46. See Smith, *supra* note 1, at 6 (“Several studies reviewed in this report found those birthparents who have had contact with the adoptive family since

Such continuing contact also enables the birth parent to satisfy a curiosity about the child's development and present circumstances.⁴⁷

Open adoption can lessen an adoptee's feelings of rejection by her birthparents. "A realistic understanding of the problems that led to adoptive placement permits acceptance of the situation. The continuing link with the birthparent dispels the notion that the [adoptee was] abandoned and forgotten."⁴⁸ Open adoption also allows the adoptee to know details of her personal history that the adoptee might otherwise long to know and, thus, avoids certain adoption-related identity conflicts.⁴⁹

Finally, open adoption can have psychological and emotional benefits for the adoptive parents. Through open adoption, the adoptive parents can have access to more complete information regarding their child's background, including facts about the birth family's genetic and health history.⁵⁰ The adoptive parents, therefore, can better answer

placement have lower levels of grief, regret and worry, along with more peace with their decisions, than those who did not have this opportunity."); *id.* at 49-50, 55-56 (reviewing studies that conclude that open adoption as opposed to closed adoption benefits birthmothers in a variety of ways); *see also* Linda F. Cushman, Debra Kalmuss, & Pearla Brickner Namerow, *Openness in Adoption: Experiences and Social Psychological Outcomes Among Birth Mothers*, 25 MARRIAGE AND FAM. REV. 7, 13 (1997) (reporting that birthmothers who had contact with the adoptive family after placement had lower levels of grief, regret, and worry than those who did not); Baran & Pannor, *supra* note 4.

47. *See* Appell, *supra* note 43, at 24 ("For birth parents, openness permits them to relinquish their child without losing the ability to learn how their child is developing, and for some to come to terms with the grief of relinquishment."). As Susan Livingston Smith explains further:

Living with the uncertainty of what became of their children is identified by birthmothers in closed adoptions as the most difficult factor they cope with, and receiving information about their children is singled out in research and literature examined for this paper as the most important thing that would help to bring them peace of mind.

Smith, *supra* note 1, at 6; *see also* Baran & Pannor, *supra* note 4, at 122 ("Not to know whether their children were alive or dead was a continuing source of sadness for some" birthmothers.).

48. Baran & Pannor, *supra* note 4, at 122.

49. *Id.* at 120 (discussing "identity lacunae," which can lead to feelings of shame, embarrassment, and low self-esteem").

50. An adoption need not be open, however, for the adoptive parents to obtain much of this type of information. *See* National Council for Adoption, *State Legislation and Mutual Consent Registries*, in *FAMILIES BY LAW* 145, 145 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) ("The argument used that open records are essential for medical and social history [is] just untrue. This information can be shared without divulging personal information about the

the child's questions relating to her personal history and the circumstances of her adoption.⁵¹ Moreover, some researchers have argued that the adoptive parents' knowledge about the birth parents can make the adoptive parents more secure in their role as parents to the child.⁵²

We should evaluate inheritance laws relating to adoption and proposed reforms in this area against the purposes and goals of modern adoption law, including the purposes and goals of open adoption.⁵³ Writing in 1984, Professor Jan Rein summarized the rationale grounding the modern approach to inheritance rights arising from adoption as follows: "The goal in nonrelative adoption cases is to achieve a complete severance of the child from his biological family and a total transplantation of the child into his adoptive family."⁵⁴

birth parents."). Indeed, every state now provides for the release of non-identifying background information to adoptive parents and adoptive children. Naomi R. Cahn & Joan Heifetz Hollinger, *Adoption and Confidentiality, in FAMILIES BY LAW* 123, 124 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

51. See Baran & Pannor, *supra* note 4, at 120; see also Appell, *supra* note 43.

52. See Baran & Pannor, *supra* note 4, at 122-23 ("[F]or adoptive parents, knowing the birthparents of their children can prevent the fears and fantasies that might otherwise have a negative effect on their relationships with their adopted children."); see also Appell, *supra* note 43, at 24 ("Research suggests that postadoption contact decreases adoptive parents' anxiety that the birth parents will attempt to reclaim the child."); Hollinger, *supra* note 37, at 159 ("Openness may even reinforce adoptive parents' sense of entitlement to parent and enable them to empathize with birth parents.").

53. Rein, *supra* note 17, at 719 ("We must assess the adequacy of state provisions for succession by, from, and through an adopted person against the goals of modern adoption.").

54. *Id.* In her important article on inheritance rights arising from adoption, Professor Rein repeatedly distinguished between adoption by "strangers" and adoptions by a biological relative, arguing that the distinction should give rise to different rules. See *id.* at 728 ("While cutting off inheritance ties between the adoptee and his natural family is usually best, arguably these ties should remain in the case of some in-family adoptions."); *id.* at 730 ("In cases in which natural associations and emotional bonds remain, continuing ties of inheritance may make sense."); *id.* at 731 (arguing that where a child is adopted by a blood relative, the law should preserve inheritance rights vis-à-vis the nonadopting side of his natural family); *id.* at 749 (arguing for differential consideration of extrinsic evidence of testator's intent to include adopted children within a class gift). I do not read Professor Rein's argument, however, as focusing on the biological ties between the adopting parent and adopted child. Rather, I read her argument as focusing on the functional relationship that is likely to continue to exist between the adopted child and her birth family in cases where the adopting parent is a biological relative of the adopted child. See *id.* at 731 (arguing that in cases of adoption by a biological grandparent, "[b]ecause of the

Professor Rein noted the congruence between this goal and the 1969 Uniform Probate Code (UPC), which provided that for purposes of intestacy "an adopted person is the child of an adopting parent and not of the natural parents."⁵⁵

What was congruent with dominant theory in 1984 arguably has become incongruent with dominant theory a quarter century later. The modern approach to inheritance rights arising from adoption derives from the asserted-equivalence model. But given the ascendant nature of the differences model, and in light of the increasing prevalence of open adoptions, it is worth considering whether inheritance law might take a different approach to rights arising from adoption that would better serve all members of the adoption triad. I turn to that task in Part III.

III. THE "UNCLEING" PRINCIPLE

As the discussion above suggests, a critical task for legal reform efforts in the adoption context is to structure family laws and family property laws that support the well-being of adoptive families, including adopted children, adoptive parents, and birth parents, by respecting their realities

likelihood that a family relationship between the child and the nonadopting side of his family will continue, the retention of inheritance ties between the adoptee and that side of the family seems reasonable"); *id.* at 749 (arguing that when a child has been adopted by strangers, the courts should not allow extrinsic evidence of a testator's intent to include adopted children within a class gift, but when "the adoptee and his biological relatives continue to know each other because the adoption occurred within the biological family" a court should consider allowing such extrinsic evidence). This same factor of a continuing relationship is critical to inheritance rights arising from an open adoption under my proposed reform. In cases of open adoption where the birth parent maintains a qualifying functional relationship with the adopted-out child subsequent to the adoption, inheritance law should have special rules to recognize and validate that relationship.

55. See *id.* at 720 (citing UNIF. PROBATE CODE § 2-109, which provided more completely that "an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent"). The 1990 UPC contains similar language. See UNIF. PROBATE CODE § 2-114:

An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

including their differences.⁵⁶ Such reforms might include efforts to promote the connections between an adopted child and her birth family. At the same time, such reforms must not undermine the role of the adoptive parents as true parents.⁵⁷ My proposed reform, set out below, is sensitive to this need to balance recognition of the importance of biological ties with the need to support the adoptive family.

This is an opportune time to be thinking about how inheritance law might better acknowledge the importance of biological ties between birth families and adopted children without undermining the well-being of the adoptive family. The National Conference of Commissioners on Uniform State Laws has appointed a Drafting Committee to Amend the Uniform Probate Code (Drafting Committee). The Drafting Committee has been working with the Joint Editorial Board for Uniform Trust and Estate Acts (JEB)⁵⁸ on considering and drafting the most extensive changes to the Uniform Probate Code since Article II of the UPC was thoroughly revised in

56. See Cahn, *supra* note 3, at 1155 (arguing that “[d]ifferences inherent in the new family structure, such as an adoptee having both a birth family and an adoptive family . . . need to be acknowledged as realities with legal consequences”); see also Rein, *supra* note 17, at 722 (arguing that discrimination against the adopted child in inheritance law undermines the well-being of the adopted child “by making the adopted child feel like a second-class family member”); In re Smith’s Estate, 326 P.2d 400, 403 (1958) (Crockett, J., dissenting) (noting the psychological harm that discriminatory inheritance laws may cause to an adopted child).

57. Professor Hollinger elucidates the nature of the challenge:

Can our laws be reshaped to ensure that adoptive parents continue to have full legal status as parents, including the right to decide how, and with whose advice, to raise their children, while at the same time accommodating the various kinds of personal, and even legal, connections that so many adoptees and their adoptive and birth families apparently want to recognize? Can child welfare policies and practices acknowledge the role of biogenetic ties in a child’s development without undermining an adoptive family’s sense of its own capacity to shape the child’s life and personality?

Hollinger, *Authenticity and Identity*, *supra* note 30, at 26.

58. The JEB is a supervisory body charged with monitoring developments relevant to the UPC. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 1:23 (4th ed. 2006). The JEB consists of three members from the Uniform Law Commission, three members from the American Bar Association, and three members from the American College of Trust and Estate Counsel. It also has an Executive Director, an Assistant Executive Director, a UPC Reporter, a liaison to probate judges, and two liaisons to law teachers. *Id.*

1990.⁵⁹ The Drafting Committee has been focusing on several provisions that concern inheritance rights arising from adoption as well as provisions that address issues that have arisen in light of the increasingly common use of assisted reproduction technologies to assist in the creation of families.⁶⁰ This aspect of the larger project⁶¹ is in line with the JEB's long-standing effort to ensure that the UPC remains responsive to the needs of the evolving American family.⁶²

For example, proposed section 2-116 would determine the status of an adopted child for the purposes of intestate succession.⁶³ This section continues the 1990 UPC's baseline rule that "[a]n individual is the child of the individual's adopting parent or parents"⁶⁴ and not a child of the individual's genetic parents.⁶⁵ The proposed revision, however, would expand the exceptions under which the adopted child would be treated as a child of his or her genetic

59. See UNIF. PROBATE CODE (September 2007 Draft Amendments). Professor Lawrence W. Waggoner, of the University of Michigan Law School, is the Reporter for the Drafting Committee to Amend the UPC. *Id.*

60. See, e.g., *id.* §§ 2-116, 2-118, 2-119. The uncleing principle I propose in this article with respect to inheritance rights arising from an open adoption could potentially be applied also to govern inheritance rights of certain participants in assisted reproduction technologies, such as a gestational surrogate or an egg donor, and the child born with the aid of such technologies. The use of assisted reproduction technologies raises policy issues distinct from those that arise from open adoption. Application of the uncleing principle to the circumstances of assisted reproduction, therefore, should be separately considered. Such consideration, however, is beyond the scope of this article.

61. The Drafting Committee is also considering amendments that relate to such disparate topics as notarized wills, reformation of wills to correct mistakes, and waiver of the elective share. See *id.* §§ 2-213, -502, -805.

62. See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1094-99 (1999) (identifying "responsiveness to the changing nature of 'family'" as one of the seven values central to Article II of the 1990 UPC).

63. See UNIF. PROBATE CODE (September 2007 Draft Amendments) § 2-116(a).

64. See *id.* § 2-116(c). Draft section 2-116 would replace the 1990 UNIF. PROBATE CODE § 2-114(b), which presently provides:

An adopted individual is the child of his [or her] adopting parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

65. See UNIF. PROBATE CODE (September 2007 Draft Amendments) § 2-116(d).

parents. Similar to existing UPC section 2-114, proposed section 2-116 would provide that

[a]n individual who is adopted by the spouse of either genetic parent continues to be the child of . . . that genetic parent[] and . . . the other genetic parent, but only for purposes of the right of the child or a descendant of the child to inherit from or through that other genetic parent.⁶⁶

The proposed revision would also treat the adopted child as the child of both of his or her genetic parents when a relative (defined as a “grandparent or a descendant of a grandparent”) of a genetic parent or the spouse or surviving spouse of such a relative adopts the child, “but only for purposes of the right of the child or a descendant of the child to inherit from or through either genetic parent.”⁶⁷ Finally, the proposed revision would also treat the adopted child as the child of both of his or her genetic parents when the child is adopted after the death of both genetic parents by someone other than a relative of a genetic parent or spouse or surviving spouse of such a relative, “but only for purposes of the right of the child or a descendant of the child to inherit through either genetic parent.”⁶⁸

The comments to the proposed UPC section 2-116 do not elaborate on the rationale or rationales that the drafters relied upon in drafting these exceptions.⁶⁹ The exceptions would seem to apply principally in cases in which the adopted child is likely to have had an established social relationship with the genetic family out of which he was adopted and,

66. *See id.* § 2-116(e).

67. *See id.* § 2-116(f). *Cf.* 755 ILL. COMP. STAT. ANN. 5/2-4(d)(1) (2007) (adopted child may inherit from and through natural parent when child is adopted by a descendant or spouse of a descendant of the child’s great grandparent); IND. CODE ANN. § 29-1-2-8 (West 1999) (adopted child may inherit through biological parent if the adoptive parents are relatives within the sixth degree of the child). Professor Patricia Roberts proposed such a revision to UPC section 2-114(b) in 1998. *See Roberts, supra* note 29, at 568.

68. *See* UNIF. PROBATE CODE (September 2007 Draft Amendments) § 2-116(g).

69. This is true as of the September 17, 2007 draft. *See id.* § 2-116 cmt. Similarly, the comments to 1990 UPC section 2-114(b), which the draft section 2-116 would replace, do not provide a rationale for the provision that when a child is adopted by a natural parent’s spouse, “the right of the child or a descendant of the child to inherit from or through the other natural parent” is not affected. UNIF. PROB. CODE § 2-114(b).

moreover, is relatively more likely to have maintained a relationship with that genetic family after the adoption.⁷⁰ We might surmise from this that the exceptions are grounded in the belief that, in the covered family situations, a member of the genetic family out of which the child was adopted would continue to think of that child as family and, consequently, would want the child to inherit from him or her as though the adoption had not taken place.⁷¹

Such a rationale would make the most sense in situations in which the genetic parent from whom the child is adopted out had acted as a parent to the adopted-out child prior to the adoption. Such is likely to have been the case in most of the family situations covered by each of the three exceptions contained in proposed section 2-116. Proposed section 2-116, however, does not require that such a genetic parent ever have functioned as a parent to the child in order for the exceptions to apply.

Assuming I have correctly surmised the purpose of the exceptions contained in proposed section 2-116, the issue arises whether proposed section 2-116 should incorporate a functional parent test so that the exceptions would apply only if the genetic parent had a functional parental relationship with the child. The Drafting Committee has included such a test in proposed sections 2-118 and 2-119, which relate to intestate inheritance rights arising from the birth of a child born to a gestational mother or conceived by other means of assisted reproduction technology, and which define

‘functioned as a parent of the child’ [to] mean[] behaving toward the child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or

70. See Roberts, *supra* note 29, at 543 (asserting that the step-parent exception in 1990 UPC section 2-114(b), which the draft section 2-116 would replace, “is justified on the theory that a child adopted by a stepparent is more likely to maintain ties with the non-custodial natural parent and his or her family than would a child in a traditional, or clear-out, adoption”).

71. See Rein, *supra* note 17, at 730 (“In cases in which natural associations and emotional bonds remain, continuing ties of inheritance may make sense.”); Roberts, *supra* note 29, at 553 (arguing that the step-parent exception in 1990 UPC section 2-114(b), which the draft section 2-116 would replace, “helps to effectuate intent by preserving family ties for inheritance purposes after an adoption in instances where the adoption often will not, in reality, sever family ties”).

holding out the child as the individual's child, materially participating in the child's upbringing, bringing the child into the individual's household as a regular member of that household, and assuming custody of the child.⁷²

I would not favor use of such a functional parent test in proposed section 2-116. It would seem likely to be the relatively rare instance in which proposed section 2-116 would cover the circumstances in which a child is adopted out and yet the birth parents did not actually ever parent the child. I am convinced that such exceptional cases would not merit requiring a showing of actual parenting in all cases that fall under proposed section 2-116. Rather, as set out below, I propose a completely new approach to inheritance rights arising from open adoption that would account for the likely attenuation of social relationships between the birth family and the adopted-out child after the open adoption by moving the adopted-out child and her birth family further apart on the family tree.

In sum, proposed UPC section 2-116, like the extant UPC, generally provides that an adopted child should be treated for inheritance purposes as though he is not a child of the genetic parent from whom he was adopted out. Proposed section 2-116 provides, however, like the extant UPC, that in certain specified circumstances, the adopted child should inherit from his genetic family as though the adoption had never taken place. That is, the adopted child is either a full-fledged child of the genetic family or he is a stranger to the genetic family.

In this article, I consider how inheritance law might account for the reality that in some circumstances the adopted child's relationship with her birth family lies on the spectrum somewhere between these two extremes. I believe that typically among these circumstances are those contemplated by the exceptions to the substitution principle that are contained in proposed UPC section 2-116. Consider,

72. See UNIF. PROBATE CODE (September 2007 Draft Amendments) §§ 2-118(b)(2), 2-119(b)(1). Draft section 2-705 ("Class Gifts Construed to Accord with Intestate Succession; Exceptions") also uses this functional test and language. The Drafting Committee borrowed the language "functioned as a parent of the child" from the RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 (2007). *Id.* § 2-118 cmt. The Reporter's Note for section 14.8 of the Restatement fleshes out in considerable detail the test for "functioned as a parent of the child."

for example, the child who is adopted by the spouse of either genetic parent.⁷³ Her genetic parent who is not the spouse of the adopting parent necessarily must have died, consented to the termination of her parental rights, or had her parental rights involuntarily terminated by a court. Even if the adopting-out parent at one time functioned as a parent to the child and, therefore, we can assume it likely that that parent's own extended family came to know the adopted child as a member of the family, it seems a strong possibility that the adopted child's relationship with the adopting-out family will attenuate after the adoption.⁷⁴

Open adoption presents an even clearer case for departing from the traditional "all or nothing" approach to the status of an adopted child vis-à-vis her birth family. The birth parent who has adopted her child out through an open adoption does not parent the child. She typically is not a primary care-giver for the child and she is not financially responsible for the child. Therefore, an "all" approach—treating the genetic parent as a parent of the child for inheritance purposes—would certainly be inappropriate in such cases. Yet, in cases in which the genetic parent has maintained a meaningful functional relationship with the child, a "nothing approach—treating the genetic parent and the adopted child as strangers to one another for purposes of inheritance—seems equally inappropriate. This is particularly so in light of the psychological importance to both the birth parent and the adopted child of the genetic

73. See *id.* § 2-116(e).

74. Cf. E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1201-04 (2000) (discussing how some of the social norms and familial bonds that are thought to promote good parenting are likely to weaken after the parents divorce). The state intervenes to a much greater degree in the family fractured by divorce than it does in the intact family. *Id.* at 1201. One of the rationales thought to support this increased level of state intrusion is the increased likelihood that the non-custodial parent will detach from the fractured family. *Id.* at 1203. The non-custodial parent's less frequent contact with her child, her conflicts with the custodial parent, her lessened parental authority over the child, and the weakening at the fracture of the family of social norms encouraging good parenting are all thought to contribute to this increased likelihood of detachment from the fractured family. *Id.* My hypothesis is that similar forces are likely to act on the family "fractured" by the adopting-out of a child such that the relationships between the adopted-out child and her birth relatives through the parent who is not the spouse of the adopting parent will attenuate.

connection between them (and, in the case of a birth mother, the gestational connection between them). Thus, an “all or nothing” approach to inheritance is flawed with respect to families arising from open adoption when the birth parent maintains a qualifying functional relationship with the adopted child.

In this article, I propose implementing in certain circumstances an “uncleing” principle for inheritance rights arising from adoption that stands on middle ground between treating the adopted-out child as a child of her birth parent and treating the adopted-out child as a stranger to her birth parent and birth family. To be clear, regardless of whether the uncleing principle applies to a family situation, the adopted child would be treated for all inheritance purposes as a child vis-à-vis the adopting family. But my proposal would create a new category of family relation that pivots around a “qualifying birth parent.” The qualifying birth parent and the adopted child would stand in relation to each other as family members, but not as parent and child, for inheritance purposes. Rather, the two would stand in relation to each other as aunt/uncle and nephew/niece.

A. Inheritance From a Birth Parent or Adopted-Out Child

Pursuant to my proposed uncleing principle, the qualifying birth parent would be treated for inheritance purposes as an aunt or an uncle of the adopted child. Thus, the qualifying birth parent would inherit from the adopted child’s intestate estate only if the adopted child died without any surviving spouse, living descendant, parent, sibling, or grandparent. In such a case, the qualifying birth parent would share in the intestate child’s estate along with the intestate child’s other aunts and uncles (or their representatives) by adoption.

Similarly, the adopted child would take in intestacy from the qualifying birth parent as a niece or a nephew. Thus, the adopted child would take only if the birth parent died without being survived by any spouse, legally-recognized living descendant, parent, or sibling.⁷⁵ In such a case, the adopted

75. Cf. COLO. REV. STAT. ANN. § 15-11-103(6) (West 1997) (providing that an adopted child shall inherit from her biological parent if the parent left no other heir).

child would share in the qualifying birth parent's estate along with the birth parent's other nieces and nephews or their representatives.

My proposal, in a narrow sense, is consistent with the current UPC and the September 2007 draft amendments to the UPC. My proposal is fully consistent with the UPC's baseline rule that "[a]n individual is the child of the individual's adopting parent or parents" and not a child of the individual's genetic parents.⁷⁶ My proposal would not alter who is a parent for inheritance purposes. It would allow an adopted child to inherit from and through her birth parent, not as a child of the birth parent, but rather as a niece or nephew of the birth parent.

The uncleing principle generally, however, is at odds with the UPC's exceptions to the baseline rule to the extent that those exceptions recognize a birth parent who has not actually parented the adopted child as a parent of the child for some inheritance purposes. In those circumstances, the reasoning grounding the uncleing principle would suggest that the birth parent should not be treated as a legal parent to the adopted child for any inheritance purposes. As noted above,⁷⁷ in the run of cases in which the exceptions would apply, it is likely that the birth parent who has died or has had her parental rights with respect to the child voluntarily or involuntarily terminated did at one time parent the child. Even in these circumstances, however, the rationale of the uncleing principle would suggest that, for inheritance purposes, the birth parent should be considered a relative of the adopted child, but not a parent of the adopted child. Because of the mutual detachment of the birth family from the adopted child and vice versa likely to follow termination of the birth parent's parental rights,⁷⁸ the adopted child and the adopting-out birth family should inherit from and through each other only as more distant relations as contrasted with the inheritance rights arising generally from a legal parent-child relationship. Thus, the uncleing principle recognizes that in certain circumstances following an open adoption, meaningful social connections continue to exist

76. See UNIF. PROBATE CODE (September 2007 Draft Amendments) § 2-116(d).

77. See *supra* notes 71-72 and accompanying text.

78. See *supra* note 74 and accompanying text.

between an adopted-out child and her birth family but those connections typically become more attenuated than they would have had the adoption not taken place. In light of this attenuation, therefore, the uncleing principle increases the distance on the family tree between the adopted-out child and her birth family.

B. Inheritance Through a Birth Parent or Adopted-Out Child

One might apply the uncleing principle to allow a birth parent and her adopted-out child to inherit from each other but not through each other. Thus, under a “from-but-not-through” approach, if the birth parent were to predecease her own mother, the adopted-out child would not inherit as an heir from her birth grandmother at the grandmother’s death and, similarly, the birth grandmother would not inherit as an heir from the adopted-out child at the adopted-out child’s death. A rationale in support of such an approach would be that even if the predeceasing birth mother and the adopted-out child had maintained a qualifying functional relationship, we might expect that the relationship between the adopted child and more distant birth relatives would be attenuated to such a degree that it should not give rise to inheritance rights. Similarly, where the adopted-out child predeceases her birth parent, we might expect that the relationship between the birth parent and any living descendant of the predeceasing adopted-out child would not be of such a quality that it should give rise to inheritance rights between the birth parent and the living descendant of the predeceasing adopted-out child.⁷⁹

I believe, however, that the better approach would be to apply the uncleing principle to allow the birth parent and the adopted-out child to inherit through each other as well as from each other.⁸⁰ The uncleing principle can adequately respond to the likely attenuation of functional relationships

79. I would think that the idea of a birth parent inheriting through the adopted-out child from the child’s *adoptive* relatives or vice-versa should be a complete non-starter, and my proposal would not provide for such inheritance rights.

80. I would also favor allowing more distant biological relatives to inherit through the birth parent from the adopted-out child, and allowing the living descendants of the adopted out child to inherit through the adopted-out child from the birth family.

between birth relatives and an adopted-out child (and living descendants of that adopted-out child) by increasing the distance between such relatives on the family tree. In sum, the uncleing principle can be used to increase by one "line of inheritance" and by two "degrees of kinship" the distance on the family tree between any birth relative and the adopted-out child or any living descendant of the adopted-out child.

To fully understand this, we first need to understand how to calculate "lines of inheritance" and "degrees of kinship." A "line" (also known as a parentela) refers to an individual's ancestor of a certain distance up the family tree from the individual and descendants of that ancestor, excluding persons who occupy a lower line.⁸¹ For example, to calculate an individual's "first line" relatives, one would go up the family tree one generation to the individual's parents and then include all descendants of those parents excluding the individual and descendants of the individual. To calculate an individual's "second line" relatives, one would go up the family tree two generations to the individual's grandparents and then include all descendants of those grandparents excluding persons in the first line and excluding the individual and descendants of the individual.⁸²

To calculate the "degree of kinship" between person A and person B, one would count generations up person A's family tree until one gets to person B or an ancestor that person A and person B have in common. Where one has first encountered a common ancestor going up the family tree (as opposed to where one has first encountered person B going up the family tree), one would then count generations down the family tree until one arrives at person B.⁸³ For example, to

81. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. a (1998); DUKEMINIER ET AL., *supra* note 11, at 78. "Parentela" and "line" have the same meaning, except that we begin numbering parentelas at the decedent and descendants of the decedent, while we begin numbering lines at the parents of the decedent and descendants of those parents. Thus, any given parentela is the same as the line numbered one higher. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. a (1998); see also DUKEMINIER ET AL., *supra* note 11, at 78.

82. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. a (1998); DUKEMINIER ET AL., *supra* note 11, at 78-80.

83. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. k (1998); see also DUKEMINIER ET AL., *supra* note 11, at 80.

calculate the degree of kinship between sibling A and sibling B, one would count from sibling A up one generation to the parent that sibling A and sibling B have in common. One would then count down from that parent one generation to sibling B. One plus one equals two. Thus, siblings are related in the second degree.⁸⁴ To calculate the degree of kinship between nephew A and uncle B, one would count from nephew A up two generations to the grandparent of A/parent of B that nephew A and uncle B have in common. One would then count down from that grandparent/parent one generation to uncle B. Two plus one equals three. Thus, a nephew and uncle are related in the third degree.⁸⁵

We can apply the uncleing principle not only to the relationship between a birth parent and the adopted-out child, but also to the relationship between any birth relative and the adopted-out child or living descendant of the adopted-out child. For simplicity's sake, however, consider first application of the uncleing principle to the relationship between the adopted-out child and her birth parent. As I have set out above, the uncleing principle transforms the adopted-out child's birth mother into her aunt for purposes of inheritance. This is another way of saying that the uncleing principle adds one line of inheritance and two degrees of kinship between the adopted-out child and her birth mother. At the child's birth, the mother is a first-line relation of the child. The mother is also related to the child in the first-degree.⁸⁶ (Quite simply, we need count up only one generation from the child to arrive at the mother.) By treating the birth mother as an aunt of the child, the uncleing principle transforms the birth mother into a second-line collateral relative.⁸⁷ This is because an individual's aunt is a descendant of that individual's grandparent (but not of that

84. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. k (1998); see also DUKEMINIER ET AL., *supra* note 11, at 79.

85. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. k (1998); see also DUKEMINIER ET AL., *supra* note 11, at 79.

86. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. j (1998).

87. An individual's "collateral" relatives include any person who is related to the individual by blood but who is not an ancestor or a descendant of the individual. *Id.* § 2.4 cmt. a; see also DUKEMINIER ET AL., *supra* note 11, at 78.

individual's parent), and the grandparent is two generations up the family tree from the individual. Moreover, by treating the mother as an aunt, the uncleing principle transforms the mother into a third-degree relation. This is because a niece would count up two generations on her family tree to arrive at her grandparent—the first ancestor in common between the niece and the aunt—and then count down one generation from the grandparent to the aunt. Adding two (generations up from the individual to her grandparent) and one (generation down from the grandparent to the aunt) gives us three as the degree of kinship between an individual and her aunt. Thus, the uncleing principle treats a birth mother as a second-line, third-degree relation of the adopted-out child.

We can apply the same uncleing principle to any other combination of birth relative and adopted-out child. For any given relation, we simply add one line of inheritance and two degrees of kinship to the line of inheritance and degree of kinship otherwise existing based on biology. Thus, for example, the uncleing principle would transform an adopted-out child's birth aunt into her first cousin once removed standing in the third line.⁸⁸ As discussed immediately above, at the child's birth, her aunt is a second-line, third-degree relation. By adding one line of inheritance and two degrees of kinship to this relationship, the uncleing principle transforms the aunt into a third-line, fifth-degree relation. Such a relative is a first cousin once removed standing in the third line of inheritance (the grandchild of an individual's great-grandparent).⁸⁹ Generally, such a relative would not inherit as an heir from the adopted-out child if the adopted-out child died survived by any spouse, living descendant, parent, or first-line collateral relative.⁹⁰ In addition, in many jurisdictions, such a relative also would not inherit as an heir from the adopted-out child if the adopted-out child died

88. An individual's first cousin once removed might stand in the second line of inheritance (the great-grandchild of the individual's grandparent) or in the third line of inheritance (the grandchild of the individual's great-grandparent). See *DUKEMINIER ET AL.*, *supra* note 11, at 79. In contrast, for example, a first cousin is always in the second line of inheritance. *Id.*

89. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 2.4 cmt. k (1998); *DUKEMINIER ET AL.*, *supra* note 11, at 79.

90. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* §§ 2.3(a), 2.4(a) (1998); *DUKEMINIER ET AL.*, *supra* note 11, at 78.

survived by any second-line relative.⁹¹ Even if the jurisdiction switched from a line-of-inheritance intestacy scheme to a degree-of-kinship intestacy scheme when no spouse, living descendant, parent, or first-line collateral relative survived the decedent, such a relative would inherit as an heir from the adopted-out child only if the adopted-out child also had no surviving second, third, or fourth-degree relation.⁹²

Finally, consider the adopted-out child as she stands in relation to her birth aunt. At birth, the child is a first-line, third-degree relation to her aunt.⁹³ The uncleing principle

91. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4(a) (1998) ("If an intestate decedent leaves no surviving spouse and no surviving descendant, nearly all intestacy statutes grant the intestate estate to the second parentela [the first line] (the decedent's surviving parents or, if deceased, to the parent's surviving descendants) and if no member of the second parentela survives the decedent, to the third parentela [the second line] (the decedent's grandparents or, if deceased, to the grandparent's surviving descendants)."); *DUKEMINIER ET AL.*, *supra* note 11, at 80.

92. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. j (1998) ("Under the 'nearest kindred' part of the statute, the relatives in the lowest degree of kinship, being the decedent's nearest living relatives, share the estate equally."); *see also* *DUKEMINIER ET AL.*, *supra* note 11, at 78-80. All American intestacy statutes utilize a line-of-inheritance approach to determine heirs through the first line of inheritance. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. c (1998) ("The decedent's parents and their descendants inherit to the exclusion of more remote ancestors and their descendants."); *see also* *DUKEMINIER ET AL.*, *supra* note 11, at 78. In general, if the decedent is survived by a descendant, no ancestors or collateral relatives will take as heirs. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3(a) (1998); *see also* *DUKEMINIER ET AL.*, *supra* note 11, at 78. If the decedent left no surviving descendant, any intestate property not passing to the surviving spouse would pass to the decedent's parents or first-line collateral relatives by representation. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. c (1998); *see also* *DUKEMINIER ET AL.*, *supra* note 11, at 78. If the decedent left no surviving descendant, no surviving spouse, no parent, and no first-line collateral relative, in most jurisdictions the intestacy scheme would continue on utilizing a line of inheritance approach (seeking to pass the intestate property to any grandparents or second-line collateral relatives by representation). RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. h (1998); *see also* *DUKEMINIER ET AL.*, *supra* note 11, at 80. Other jurisdictions would switch to a degree-of-kinship system (seeking to pass the intestate property to the blood relative with the lowest degree-of-kinship number with respect to the decedent). RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. j (1998); *see also* *DUKEMINIER ET AL.*, *supra* note 11, at 80.

93. At the same time, as discussed above, the aunt is a second-line, third-degree relation to her niece. While two relatives necessarily share the same degree of kinship with respect to one another, they do not necessarily stand in

would add one line of inheritance and two degrees of relation between the adopted-out child and her birth aunt to transform the adopted-out child into a second-line, fifth-degree relation of the aunt. Thus, the adopted-out child would take through her predeceasing birth parent from her birth aunt, if at all, as a first cousin once removed standing in the second line (as a great-grandchild of the birth aunt's grandparent).⁹⁴

C. *Qualification for the Uncleing Principle*

My proposed reform would apply the uncleing principle to give rise to inheritance rights arising from an open adoption only when one of two circumstances exist. The first circumstance is when the birth parent and the adoptive parents include in the adoption decree their agreement that the uncleing principle shall apply to alter the intestacy scheme. The second circumstance exists when the birth parent has maintained a "qualifying functional relationship" with the adopted-out child. Thus, I advocate both a registration and a functional (multi-factor) approach for determining inheritance rights under the uncleing principle.

Both means for qualification derive from the rationales and goals of the uncleing principle. I briefly review those goals and rationales, therefore, before turning to a discussion of the details of each means for qualification. The first goal of the uncleing principle is to better promote donative intent than does the presently dominant "all or nothing" approach to inheritance rights arising from adoption. The principal

the same line of inheritance with respect to one another. With respect to an aunt and her niece, for example, the niece is a descendant of the aunt's parent and, therefore, a first line collateral relative of the aunt. The aunt, however, is not a descendant of the niece's parent and, therefore, is not a first-line collateral relative of the niece. Rather, the aunt is a descendant of the niece's grandparent and, therefore, is a second-line collateral relative of the niece.

94. Finally, one might extend my proposed reform so that the default rule for interpreting donative instruments, such as a will or a trust, would be in accord with the uncleing principle. Thus, for example, in accordance with the uncleing principle, the adopted-out child would presumptively share in a class gift to "my nieces and nephews" created in the will or trust of the adopted-out child's birth mother. I would not favor such an extension of the uncleing theory. It is not likely that a testator or settlor would use the words "nieces and nephews" to mean "nieces, nephews, and adopted-out child." A default rule that would interpret "nieces and nephews" to mean "nieces, nephews, and adopted-out child," therefore, would not seem well-suited to the promotion of donative intent.

assumption that grounds the uncleing principle is that when a birth parent and the adopted-out child have maintained a functional relationship, they are likely to view each other as family, but not as functional parent and child. The uncleing principle, therefore, treats the adopted-out child and birth family as potential heirs of each other but increases the distance between them on the family tree by one line of inheritance and two degrees of relation.

The second goal of the uncleing principle is to support the well-being of all members of the adoption triad in cases of an open adoption where the birth parent has continued to have a relationship with the adopted-out child subsequent to the adoption. My reform supports the adoptive parents in their role as parents by recognizing the primacy of the care-taking family. For this reason, the uncleing principle does not in any manner or for any purpose treat a birth parent who has adopted her child out as the adopted-out child's parent. But at the same time, the uncleing principle recognizes and validates the psychological and emotional bonds that often develop between an adopted-out child and her birth parent and birth family. The uncleing principle implicitly teaches that biological ties are most meaningful when there exists a functional familial relationship as well. By recognizing and validating the biological and functional relationship between a birth parent and her adopted-out child, the uncleing principle seeks to lessen the feelings of loss, regret, and shame that a birth parent may have concerning the placement of her child for adoption.⁹⁵ Thus, my proposed reform supports a mindset that encourages the birth parents to stay involved in the adopted-out child's life throughout that child's life, even if they will not play the role of parent to that child.

With these goals and rationales in mind, I turn now to a discussion of my proposed means for qualifying for inheritance rights under the uncleing principle. First, a birth parent and the adopting parents should be able to opt into the uncleing principle expressly at the time the court enters a final adoption decree. That is, the open adoption agreement

95. *But cf.* Rein, *supra* note 17, at 730 ("The preservation of the child's relationship with a parent who has voluntarily relinquished the child for adoption or abandoned him in some manner seems wrong.").

and the adoption decree should be able to change the intestate inheritance rights otherwise arising from the open adoption.⁹⁶ When the birth parent and the adoptive parents so agree and the court includes the agreement in the adoption decree, the uncleing principle would apply to maintain a legal relationship between the birth family and the adopted-out child.⁹⁷ The uncleing principle would increase the distance on the family tree between the adopted-out child and any birth relative by one line of inheritance and two degrees of relation.

It is worth emphasizing that the uncleing principle would not allow the birth parents and adoptive parents the freedom to alter the intestacy scheme in just any way they would like. Rather, the uncleing principle would allow the parties to opt into a fixed alternate scheme that would treat the birth parent as an aunt or uncle to the adopted-out child and would similarly increase the distance on the family tree between the adopted-out child and other members of the birth family. Most importantly, and because the law should not treat one

96. See, e.g., ALASKA STAT. § 25.23.130(a)(1) (2006) (adoption decree "terminate[s] all legal relationships between the adopted person and the natural parents and other relatives of the adopted person, so that the adopted person thereafter is a stranger to the former relatives for all purposes including inheritance, unless the decree of adoption specifically provides for continuation of inheritance rights"); ME. REV. STAT. ANN. tit. 18-A, § 2-109(1) (1998) (adoption decree can preserve adoptee's inheritance rights from her birth family); Cahn, *supra* note 3, at 1131-32 (discussing the 1873 Nebraska adoption statute, NEB. REV. STAT. § 797 (1873) and the 1873 North Carolina adoption statute, N.C. GEN. STAT. § 3 (1873), which allowed the birth parents and adopting parents to set out in the adoption petition the adoptee's inheritance rights).

97. A court will bless the open adoption agreement in the adoption decree. Unlike a will, therefore, the modification to the intestacy scheme arising from the open adoption agreement generally will not be revocable (except, in a sense, by will) and generally will not be subject to challenge. Although an adoption can be challenged after the final adoption decree, many states have a short statute of limitations for bringing such a challenge, typically six months to three years. See, e.g., CAL. FAM. CODE § 9102(a) (West 2004) ("An action or proceeding of any kind to vacate, set aside, or otherwise nullify an order of adoption on any ground, except fraud, shall be commenced within one year after entry of the order."); *id.* at (b) ("An action or proceeding of any kind to vacate, set aside or nullify an order of adoption, based on fraud, shall be commenced within three years after entry of the order."); see generally 3 ADOPTION LAW AND PRACTICE, *supra* note 26, § 8.01[3] (discussing time limits for bringing an action challenging an adoption and noting that "many states have enacted statutes providing that a final decree of adoption may not be attacked – neither directly nor collaterally, and for no jurisdictional or procedural error – after the running of a defined period of limitations (usually not in excess of three to five years)").

who has not parented as a parent, the parties would not be allowed to agree that the law would treat the birth parents as legal parents for inheritance purposes.

When the adoptive parents and birth parents did not opt into the uncleing principle at the time of the adoption decree, my proposed reform would look to the quality of the relationship between the birth parent and the adopted-out child following the open adoption to determine if the birth parent maintained a “qualifying functional relationship” with the child.⁹⁸ The functional test would not focus on whether the birth parent ever functioned as a parent of the child.⁹⁹ Rather than asking whether the birth parent fulfilled parental responsibilities, exercised parental authority, or generally behaved as a parent with respect to the child, the inquiry would focus on whether the birth parent provided emotional support to the child during their mutual lives. In short, the inquiry is not whether the birth parent “parented” the adopted-out child, but rather the inquiry is whether the birth parent “uncled” the adopted-out child.¹⁰⁰ Just as an aunt or uncle might have an emotionally supportive relationship with a niece or nephew without any right to the care, custody, or control of the child, a birth parent might enjoy a “qualifying functional relationship” with the adopted-out child despite her lacking any custody rights or parental authority with respect to the child.

Among the factors that I would think would be highly relevant to the central inquiry of whether the birth parent “uncled” the adopted-out child would be the duration and

98. Cf. 20 PA. CONS. STAT. ANN. § 2108 (West 2005) (allowing an adopted child to inherit from her birth relatives other than her birth parents when those birth relatives have maintained a relationship with the adopted child).

99. Cf. UNIF. PROBATE CODE (September 2007 Draft Amendments) § 2-118(b)(2):

“Functioned as a parent of the child” means behaving toward the child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, bringing the child into the individual’s household as a regular member of that household, and assuming custody of the child.

100. A birth parent who performed any of the parental functions set out in draft section 2-118 after adopting out her child likely would meet the lesser standard for maintaining a “qualifying functional relationship” set out in my proposed reform. Only in that sense might the inquiry as to whether the birth parent parented the child be relevant.

constancy of the functional relationship between the birth parent and the adopted-out child; whether the birth parent regularly visited the adopted-out child; whether the birth parent regularly communicated with the adopted-out child via telephone calls, letters, emails, cards, etc.; whether the birth parent shared in or otherwise acknowledged major life events of the adopted-out child such as birthdays, major holidays, religious milestones, graduations, and the child's wedding; and whether the birth parent provided for the adopted-out child by means of will substitutes.¹⁰¹ Neither the presence nor the absence of any one of these factors alone should be dispositive. Rather, the court should consider the totality of the circumstances.¹⁰²

I would think, however, that the duration and constancy of the relationship should be given the greatest weight in most cases. Typically, only where the birth parent has provided life-long emotional support for the adopted-out child—where the birth parent has never abandoned the child—should the relationship merit recognition that would give rise to intestate inheritance rights. Thus, for example, where a birth parent had maintained a meaningful relationship with the adopted-out child during the child's minority but had little contact with the child for many years prior to the death of the first of them to die, the relationship

101. Naming the adopted-out child as a will substitute beneficiary might be an indication that the decedent would prefer that the adopted-out child inherit as her heir. Cf. Mary Louise Fellows, Monica Kirkpatrick Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 59-62 (1998) (reporting a positive relationship between a respondent having named her committed partner as her life insurance beneficiary and the respondent's preference for having a hypothetical committed partner inherit a larger portion of a hypothetical probate estate).

102. Nevertheless, a statute might employ a rebuttable presumption that "uncleing" has occurred following an open adoption in cases in which there was an open adoption agreement that called for a meaningful social relationship between the birth parent and the adopted-out child and in which a minimum number of specified circumstances (e.g., the birth parent regularly visited with the adopted child) also existed. Cf. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS 108-09 (3d ed. 2002) (Professor Waggoner's "Working Draft" proposal to reform intestacy law to include intestate inheritance rights for unmarried committed partners by means of a multi-factor approach, which proposal employs a rebuttable presumption that the relationship at issue was "marriage-like" if the decedent and the claimant engaged in one or more of four specified behaviors).

generally should not be found to constitute a “qualifying functional relationship.”¹⁰³ Likewise, where a birth parent failed to maintain a meaningful relationship with the adopted-out child during the child’s minority, the relationship generally should not be found to constitute a “qualifying functional relationship,” regardless of whether the birth parent and the adopted-out child began a meaningful relationship during the child’s adulthood.¹⁰⁴

While the introduction of uncertainty into the probate process should always be a concern whenever one is contemplating increased judicial discretion and the utilization of a multi-factor test,¹⁰⁵ the uncleaning principle has a relatively high objective hurdle that should lessen fears about uncertainty: The multi-factor inquiry can be relevant only in cases of a birth parent who adopted-out her child by means of an open adoption and maintained some regular relationship with the child. Moreover, as discussed above, the uncleaning principle would apply to pass intestate property, at its most inclusive, only when the decedent left no living descendant, no surviving spouse, no parent, and no sibling. This too should lessen concerns about any opening of the floodgates for vexatious litigation.

103. *But cf.* Estate of Griswold, 79 Cal. App. 4th 1380 (Cal. Ct. App. 2000), *abrogated by* In re Griswold, 94 Cal. Rptr. 2d 638 (2000) (holding that a biological father’s admission of his paternity in a “bastardy” proceeding during the out-of-wedlock child’s infancy was a sufficient acknowledgement of parentage for purposes of California’s inheritance statute; the biological father had paid court-ordered support for the child until the child was eighteen years old, but never met or communicated with the child, and had no involvement in the child’s life after the child turned eighteen and until the biological father died thirty-four years later).

104. *Cf.* CAL. PROB. CODE § 6454 (West Supp. 2008) (treating a foster parent or stepparent as a parent of foster child or step child for certain purposes of intestate succession where, *inter alia*, “[t]he relationship began during the [child]’s minority and continued throughout the joint lifetimes of the [child] and the [child]’s foster parent or stepparent”).

105. *See, e.g.*, E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OREGON L. REV. 255, 284-89 (2002). This article discusses the importance of administrative convenience in designing an intestacy provision, commenting:

It is a principal challenge for succession law in this era of the emergence of the legal movement to recognize functional family to balance a concern with certainty and ease of administration with the desire for succession law to better serve the needs of property owners who have formed less dominant family structures.

Id. at 286-87.

IV. CONCLUSION

This article proposes an uncleing principle to determine intestate inheritance rights in cases of open adoption in which a birth parent has maintained a "qualifying functional relationship" with the adopted-out child subsequent to the adoption. When applicable, the uncleing principle would treat the adopted-out child and her birth parent as potential heirs of one another. Unlike the presently dominant "all-or-nothing" approach to inheritance rights arising from adoption, however, my proposal would not under any circumstances treat the birth parent as a legal parent of the adopted-out child for purposes of inheritance. Rather, the uncleing principle would treat the birth parent as an uncle or aunt to the adopted-out child, and would similarly increase the distance on the family tree between the adopted-out child and members of her birth family by one line of inheritance and two degrees of kinship.

When applicable, the uncleing principle would better serve the interests of the adopted child, her adoptive family, and her birth family than does the all-or-nothing approach, under which the adopted-out child is either a child of her birth parents for purposes of inheritance or is a stranger to her birth parents for purposes of inheritance. The uncleing principle affirms the parental role of the adoptive parents by refusing to treat a birth parent as a legal parent. Simultaneously, the uncleing principle recognizes and validates the importance of the bond between the adopted child and her birth family when the birth parent has maintained a sufficient functional relationship with the adopted child subsequent to the adoption.

The uncleing principle differs significantly from the proposed UPC section 2-116 presently under consideration by the Drafting Committee to Amend the Uniform Probate Code. Most significantly, proposed UPC section 2-116 continues the all-or-nothing approach to intestate inheritance rights arising from adoption. In other ways, however, my uncleing principle is in sync with some of the Drafting Committee's more innovative September 2007 draft amendments to the Uniform Probate Code.

First, the September 2007 draft amendments

demonstrate a marginally increased openness to recognition of relationships based on function as opposed to status.¹⁰⁶ Specifically, the proposed amendments utilize a functional test in several provisions to determine whether an individual functioned as a parent of a child for the purposes of determining intestate inheritance rights or construing class gifts.¹⁰⁷ The September 2007 draft amendments' "functioned as a parent of the child" test is similar in kind to my proposed functional test for determining whether a birth parent maintained a "qualifying functional relationship" with the adopted-out child.

Second, the September 2007 draft amendments demonstrate an increased willingness to recognize non-traditional heirs when such heirs would not displace more traditional heirs. Specifically, proposed section 2-103 would recognize as an heir the descendant of the intestate decedent's predeceasing spouse where the decedent left "no surviving spouse, descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent."¹⁰⁸ Similarly, my proposed uncleing principle would create new heirs only as a near last resort. My principle would give rise to inheritance rights that would displace only distant heirs or the state as "heir" by escheat.

This feature of the uncleing principle—displacement of only distant heirs—should lessen resistance to the functional component of my proposal—use of a functional test to determine intestate inheritance rights. By definition, the

106. The 1990 UPC considers function only in a negative sense in providing that "[i]nheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child." UNIF. PROBATE CODE § 2-114(c) (1998).

107. See UNIF. PROBATE CODE (September 2007 Draft Amendments) §§ 2-118, 2-119, 2-705.

108. *Id.* § 2-103. More fully, draft section 2-103 provides: "If there is no surviving spouse, descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent, [but] there is one deceased spouse who has one or more descendants who survive the intestate decedent, the intestate estate passes by representation to those descendants." *Id.* § 2-103(5)(A). "If there are more than one deceased spouses who have one or more descendants who survive the intestate decedent, the intestate estate is divided into as many equal shares as there are such deceased spouses, each share passing by representation to those descendants." *Id.* § 2-103(5)(B). "The term deceased spouse refers to an individual to whom the intestate was married at the spouse's death." *Id.* § 2-103 cmt.

uncleing principle would not operate in cases in which the intestate decedent is survived by a spouse, living descendant, parent, or sibling. Experimentation with the use of a functional approach would seem to be preferable in such circumstances, as contrasted with use of a functional approach to displace a spouse, living descendant, parent, or sibling as heir.

In short, the fear of getting the functional test wrong should be less in cases in which only more distant heirs are consequently supplanted. This is so for three reasons relating to donative intent, reliance, and reciprocity.¹⁰⁹ First, displacing more distant heirs is less likely in the run of cases to contravene the donative intent of the decedent as contrasted with displacing more closely-related heirs.¹¹⁰ Second, distant heirs are less likely to have been economically dependent on the decedent as contrasted with more closely-related heirs.¹¹¹ And finally, distant heirs are less likely to have contributed to the decedent's accumulation of wealth and are less likely to have provided for the decedent's well-being as contrasted with more closely-related heirs.¹¹²

My proposed uncleing principle, therefore, provides an attractive means for inheritance law practitioners and

109. See, e.g., Spitko, *supra* note 105, at 269 (identifying the promotion of donative intent, reciprocity, reliance, and ease of administration as the four values that should ground an intestacy scheme).

110. See Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Study of Will Substitutes: Should Intestacy Statutes Take Will Substitutes into Account?* (unpublished manuscript, on file with author) (reporting on the authors' empirical study in which survey respondents distributed more of a hypothetical probate estate to a will substitute beneficiary who was a second-degree relation of the decedent than to a will substitute beneficiary who was a third-degree relation of the decedent, and distributed more of a hypothetical probate estate to a will substitute beneficiary who was a third-degree relation of the decedent than to a will substitute beneficiary who was a fourth-degree relation of the decedent).

111. See Ralph Calhoun Brashier, *Half-Bloods, Inheritance and Family*, 37 U. MEM. L. REV. 215, 236 (2007) ("The policy concerns underlying statutes for half-blood relatives differ substantially from those underlying provisions for members of the family the decedent created" in that half-blood relatives are less likely to have become dependent on the decedent for their support and are less likely to have contributed to the decedent's acquisition of wealth.); see also Thomas E. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 187 (1935) (identifying "provision for dependents of the decedent" (as well as promotion of donative intent) as one of "two primary considerations" that should ground an intestacy statute).

112. See Brashier, *supra* note 111, at 236.

scholars to become habituated to the idea of introducing function and the concomitant increased judicial discretion into the probate process. If the functional component of my proposal were to prove workable, one might expect that such success would help pave the way for further inheritance law reforms utilizing functional tests which might displace less distant heirs such as the decedent's children, parents, and siblings in favor of the decedent's functional family.¹¹³

113. See, e.g., Spitko, *supra* note 105 (considering how one might best structure a multi-factor approach intestacy scheme that might grant intestate inheritance rights to a surviving committed partner).